JUL 8 1982
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No. 82-35

IN THE

Supreme Court of the United States

October Term, 1982

FRANK REISNER, d/b/a INTERMECCANICA AUTOMOBILI, and INDRA IMPORTS, INC.,
Petitioners,

v.

GENERAL MOTORS CORPORATION and ADAM OPEL, A.G.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under Rule 56(c), summary judgment dismissing an antitrust conspiracy complaint can be granted where the court (a) draws its own facts of the case from the discovery record, and (b) takes the reasonable inference most favorable to the nonmoving party where the evidence is found susceptible of different inferences, all without regard to whether there is any "genuine issue as to any material fact."

2. Whether the standard for determining the existence of a conspiracy, under Section 1 of the Sherman Act, is the legality of the economic self-interest of the alleged co-conspirators, a standard borrowed from *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

LIST OF PARTIES

The two petitioners, Frank Reisner and Indra Imports, Inc., were also the two plaintiffs in the District Court and the two appellants in the Second Circuit. Petitioner Indra Imports, Inc., is a New Jersey corporation; it was the exclusive importer and distributor in the United States of Frank Reisner's Indra automobile. Indra Imports, Inc., has no parents, subsidiaries or affiliates to report under Rule 28.1.

The two respondents, General Motors Corporation and Adam Opel, A.G., were the two defendants in the District Court and the two appellees in the Second Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Frank Reisner and Indra Imports, Inc., pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 8, 1982.

OPINIONS BELOW

The opinion of the Second Circuit, entered on February 8, 1982, is reported at 671 F.2d 91. It is reprinted in Appendix A hereto, p. 1a, *infra.*

The opinion of the United States District Court for the Southern District of New York, entered on March 30, 1981, is reported at 511 F.Supp. 1167. It is reprinted in Appendix B hereto, p. 21a, *infra.*

The District Court, on February 9, 1978, entered an "endorsement" on an earlier motion to reargue a motion to dismiss. That "endorsement" is not reported, but is reprinted in Appendix B hereto, p. 44a, *infra.*

JURISDICTION

The petitioners brought this treble damage antitrust action against the respondents in the District Court. The original complaint was filed on May 19, 1976. On March 30, 1981, the District Court entered summary judgment for the respondents before trial, and dismissed the amended complaint. Appendix B hereto, p. 21a, *infra.*

The Second Circuit affirmed the District Court's action, the judgment and opinion being entered on February 8, 1982. See Appendix A hereto, p. 19a, *infra.* No rehearing was sought. On timely application, Justice Marshall on April 30, 1982, signed an order extending the time for filing this petition for a writ of certiorari to and including July 8, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

Rule 56(c), Federal Rules of Civil Procedure:

> (c) *Motion and Proceedings Thereon* . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

The two petitioners, Frank Reisner and his American importer, Indra Imports, Inc., brought this treble damage antitrust action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14. Named as defendants were the two respondents -- General Motors Corporation ("GM"), and Adam Opel, A.G. ("Opel"), GM's wholly-owned German subsidiary.

The essence of this case is found in the amended complaint that now stands dismissed. In the section of the complaint entitled "The Offenses Charged," J.A. 112,[1] petitioners alleged that the two respondents "engaged in an unlawful combination and conspiracy and have acted in unreasonable restraint of trade" in violation of the aforesaid statutes. Two types of illegal conduct, violative of Section 1 of the Sherman Act, were alleged:

(1) Deliberate elimination of petitioners as competitors of GM and Opel in the American specialty car market; and

(2) Unreasonable refusal by GM and Opel to sell to or permit petitioner Reisner to buy certain special automobile components for use in the "Indra" car that Opel had induced Reisner to build with Opel parts, unless Reisner also purchased and used in the "Indra" a GM engine without emission controls. Opel was the only source of supply for these components, around which the

[1] References herein to "J.A." are to the two-volume Joint Appendix filed by the parties in the Second Circuit. References herein to "App." are to the Appendix attached to this petition.

"Indra" was designed. Opel at all times understood that Reisner could sell the "Indra" in the United States, his main market, only if it had a pollution-free engine meeting EPA standards. J.A. 112.

Petitioners demanded a jury. J.A. 107, 119.

A. The summary judgment facts

In this summary judgment context, the relevant facts must be drawn in large part from the pretrial discovery record and the parties' affidavits. And from the Rule 56 standpoint, the relevant facts must include those material facts as to which there are "genuine issues."[2] With that understanding, the facts are:

(1) Petitioner Reisner manufactured sports cars at his factory in Turin, Italy, under the name Intermeccanica Automobili. He specialized in low-volume production of specialty sports-cars, largely for export to the United States.

(2) By 1970, Reisner was producing about 100 cars a year of his "Italia" sports car – a fast sleek luxury car powered by "clean" or emission-controlled Ford engines that met EPA standards in the United States. The chief market for the Italia was indeed the United States; by 1971, a total of more than 300 Italia cars had been sold there. The Italia also tapped the European market, mainly in Germany. Reisner used the services of one Erich Bitter, a former Opel racing driver, to market the Italia in Germany.

(3) The Second Circuit, but not the District Court, made an inferential finding that the disenchantment of American distributors with Reisner's Italia car impelled Reisner to initiate negotiations with Opel in September 1970 about the possibility

[2]The opinions of the two courts below contain what purport to be complete summaries of the facts. See Second Circuit opinion, App. 3a-7a; District Court opinion, App. 21a-23a, *Infra*. But those summaries, satisfactory to a point, disguise numerous highly contested facts of a material nature. The disguise is in the form of judicial fact findings, or absolute statements of fact, which are unjustified in the context of summary judgment proceedings.

of constructing a new car with Opel components. See App. 3a-4a. That, of course, was respondents' theory. But those facts and inferences are in dispute. Petitioners can point to testimony from respondents' own witnesses that the American distributors highly praised the Italia, protesting only its high price. J.A. 912-913. And there is clear evidence that it was Opel – not Reisner – who initiated negotiations about building a new car. J.A. 615, 1142-1143.

(4) The motivation for Opel having initiated negotiations is evident from the record, even as summarized by the Second Circuit. Opel was having difficulty marketing its "Diplomat" line of sports cars. Sales were sluggish. And in Germany, which was the Diplomat's main market,[3] "[t]he Diplomat had a stodgy image." App. 4a, *infra*. Something had to be done to improve the Diplomat's sales and image.

(5) What triggered Opel's interest in Reisner as a possible solution to the Diplomat problem was a chance meeting between Opel's general sales manager, Robert Lutz, and Reisner's German sales representative, Erich Bitter. They met at a race track in the summer of 1970, at which time Bitter was driving an Italia. Lutz examined and drove the car. He was greatly impressed with it. As the Second Circuit noted, Lutz became "interested in Reisner using Opel Diplomat parts in constructing the Italia . . . [and] thought that the sale through Opel dealers of a high performance . . . sports car made with Diplomat parts would generate favorable publicity and showroom traffic for the Diplomat." App. 4a, *infra*. Lutz asked Bitter to arrange a meeting with Reisner.

(6) The meeting between Lutz and Reisner, with Bitter present, took place at Opel headquarters in Russelheim, Germany, on September 4, 1970. App. 4a, *infra*. At this meeting, Lutz broached the idea of Reisner constructing a new specialty car with Opel components. Reisner was favorably impressed with

[3]The Diplomat was powered by a "dirty" Chevrolet 327 engine, with no emission controls. Thus it did not meet the American EPA standards and and could not be imported into the United States. Its market was exclusively European. See App. 4a. *infra*.

the idea. In Bitter's presence but without his participation,[4] Lutz and Reisner orally agreed "that Reisner would design a car to be built around Opel components . . . [and] that Reisner would build a prototype and two cars in time for the Geneva Auto Show the next year." App. 4a, *infra*. This agreement was never reduced to writing, though Reisner had been promised that it would be. J.A. 1260.

(7) Reisner made it clear to Lutz at this initial meeting and thereafter that, since continued access to the American market was vital to Reisner's survival as a sports car manufacturer, the projected new car would have to be powered by a "clean" emission-controlled engine meeting EPA standards. Lutz fully understood. The Opel Diplomat at that time was using a "dirty" Chevrolet 327 engine, although Chevrolet also produced a "clean" 350 c.i.d. engine. As the Second Circuit observed, since Reisner "was interested eventually in exporting the Indra [the projected new car] to the United States . . . he secured from Lutz a promise that Opel would provide the 'clean' 350 CID engines used in the [Chevrolet] Corvette. Specifically, Lutz told Reisner that 'I am pushing for that [350] engine, and as a temporary measure use the 327. And I'll make sure you get the 350.' " App. 4a-5a, *infra*. At the time of these statements, Opel was testing the Opel components with a 350 engine that Opel had installed in a "test car" on Opel's premises. J.A. 937-938. Respondents thereafter concealed the test results. J.A. 137, 221-222. Thus it must be presumed that the results were adverse to respondents' contentions that the 350 engine made the Indra unsafe. See App. 6a-7a, *infra*.

(8) After making various design changes to satisfy Opel engineers, Reisner completed a prototype of the new car, built

[4]The Second Circuit stated that "Lutz, Reisner, and Bitter agreed orally that Reisner would design a car to be built around Opel components." App. 4a, *Infra*. Bitter was simply not a principal in this oral agreement. The District Court referred only to Reisner and Lutz in summarizing the meeting. App. 21a, *Infra*. And Bitter himself made clear that he was merely an independent importer of the Italia car in Germany. J.A. 1282-1286.

around the components made and supplied only by Opel. Opel engineers pronounced it "surprisingly good," and were equally impressed with Reisner's "grasp of engineering and his willingness to make the necessary minor modifications." J.A. 32, 37.

(9) Using Opel components and the 327 engine, Reisner then set up a production line at his Turin plant for the new car, now named the "Indra." Pressure from Opel to concentrate on the new Indra meant that Reisner had to dismantle his production line for the Italia line. And discontinuing the Italia, with its "clean" Ford engine, meant immediate loss of Reisner's vital American market — at least until Lutz kept his promise to obtain "clean" GM engines to power the new Indra.[5]

(10) But Lutz never kept his promise to supply Reisner with "clean" Chevrolet 350 engines. The Second Circuit "found" that "at no time did Opel use the 350 CID engines in its own cars or have any available for sale to Reisner or to anyone else." App. 5a, *infra*.[6] Yet GM and Opel exhibits and interrogatory answers in the record indicate that GM not only manufactured a "clean" 350 engine but made it available to Opel and any other car manufacturer that wanted it. J.A. 28, 33, 39, 920-921. It is thus reasonable to infer, on this summary judgment motion, that Lutz and Opel could have kept this promise; at least there is conflicting evidence on the matter.

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[5]The Second Circuit "found" that in no event could the new Indra have been exported to the United States in the 1970-1972 time period since it did not meet other safety requirements imposed by federal law. App. 5a, *Infra*. But that "fact" is disputed. There is testimony in the record that manufacturers of fewer than 500 cars a year were exempt from such safety requirements. J.A. 1233-1234. It can be implied, therefore, that the major if not sole reason Reisner could not have sold the Indra in the United States at this time was his inability to obtain the promised "clean" engines meeting EPA standards.

[6]This "finding" is taken almost verbatim from an affidavit of a GM vice-president, Alexander Cunningham. J.A. 863. The entire affidavit, however, was the subject of an unopposed motion to strike. J.A. 1027, 1030.

(11) The first Indra was shown at the Geneva Auto Show in the spring of 1971. In the Second Circuit's words, "it attracted considerable favorable publicity and many orders." App. 5a, *infra*. While the court also "found" that "many of the early Indras were defective and dealer enthusiasm fell off," *Id.*, there is other evidence in the record that these early faults were traceable to (a) Opel's pressure to produce the cars in a hurry, before Reisner could get them ready for delivery, and (b) defects in some of the Opel parts, as well as delivery delays. J.A. 1251-1252, 1262. Moreover, there is uncontradicted evidence that in July 1971 Opel began secretly to invest in the manufacture of a new sports car by Bitter, to compete with the Indra. App. 11a, *infra*. A fair inference is that the fall-off in dealer enthusiasm with the Indra was substantially related to this Opel/Bitter venture. But nonetheless, as the Second Circuit said, "78 Indras were manufactured in 1971-72 and sold in Europe," all equipped with the "dirty" 327 engine. App. 5a, *infra*.

(12) In marketing the Indras in Germany, Reisner continued to use the services of Erich Bitter. Reisner made the arrangements with Bitter GmbH & Co., KG, a new company organized by Bitter. This was done to help overcome the problem of Bitter's lack of credit. Reisner required that the new company, by way of down payment on each Indra that Bitter GmbH & Co. ordered, prepay Opel on Reisner's behalf for the components and engines that Opel sold and shipped directly to Reisner in Italy. J.A. 952-953, 1141, 1275-1276, 93-99. These financial arrangements were later to be used by the respondents as a central part of their defense to this antitrust suit, i.e., that Opel's customer was at all times Bitter, not Reisner.

(13) Early in 1971, two events occurred that petitioners claim set in motion the conspiracy by GM and Opel to destroy Reisner's competitive business, particularly the threat he posed as a competitor in the American submarket of luxury, high-performance sports cars. *First*, Reisner visited GM's overseas operations office in New York, seeking to make arrangements for delivery of the promised "clean" Chevrolet 350 engines. J.A. 23-25. This was the first time GM was made aware that Opel

had agreed to sponsor and supply a car that would be imported into the United States and thus would compete with GM's Corvette line in the sports-car market. *Second*, GM representatives carefully inspected the Indra model on display at the Geneva Auto Show. J.A. 1122-1124, 1126. The Indra's competitive appeal was plainly evident. The pretrial record reveals the steps that ensued whereby GM and Opel systematically (a) destroyed Reisner's existing and prospective American sales market, (b) weakened his European market, and (c) finally destroyed Reisner's business by cutting off entirely his supply of all GM/Opel parts.

(14) Within 24 hours after Reisner visited GM's overseas office in New York, the manager of that office, W.R. Drury, dispatched a memo (dated February 17, 1971) to Opel and other GM branches chastising Opel for entering into an agreement with Reisner that was inconsistent with GM's current "domestic practice [that] specifically prohibits the outside sale of components designed and built especially for use in our vehicles." J.A. 23. While nothing was said about GM's foreign policy in this regard, the Drury memo indicated that the spirit of the domestic policy applied. Thus, said the memo, Reisner's Intermeccanica operations "would not qualify [for purchases] and therefore should not be quoted by Opel." J.A. 24. The memo further records that, when Reisner asked for GM's help in obtaining the 350 engines, Drury told him that "as an Italian based organization he would have to work through GM Italia as regards U.S. source power trains." J.A. 24. What Drury did not tell Reisner was that, as recorded in the memo, GM Italia had earlier been advised that GM was "unable at this time to commit for the supply of North American source components." J.A. 24.[7]

(15) Within weeks after GM's discovery of the Lutz-Reisner agreement, a series of further conspiratorial events occurred:

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[7]The memo also stated that GM Italia had evaluated Reisner's Turin plant "as small with very little equipment – rather like a body repair shop." J.A. 23. This was followed by a statement that GM had proposed "that small volume specialty firms do not qualify" for GM component sales. J.A. 23.

(a) Opel pressured Reisner into advancing by six months his Indra production schedule, knowing this would mean termination of the production of the Italia with its "clean" Ford engine. J.A. 1262-1264.

(b) By July 1971, Opel began (i) secretly to plan and invest in the manufacture by Bitter of a new sports car to compete with the Indra, (ii) a campaign to disparage Reisner and the Indra, and (iii) to slow down delivery of Opel parts and engines to Reisner, thus halting his production line from time to time. J.A. 733-735, 841-842.

(c) In September 1971, Opel's tax department 'determined" that Bitter – not Reisner – was Opel's customer, and reissued all parts invoices to reflect such "fact." J.A. 43-45.

(d) In May 1972, Reisner wrote GM Italia, the Italian subsidiary of GM, "seeking to purchase the Chevrolet 350 engine for the Indra so that he could sell his car in the United States." App. 22a, *Infra.* He mentioned that his annual production was about 150 cars and expressed an interest in purchasing engines in lots of 20. This request was referred to W.R. Drury, GM's overseas manager. Drury in turn wrote to R.H. Boniface, Opel's new general sales manager, stating that "there is insufficient volume evidenced in Reisner's May 18, 1972, letter," and asking for an "up-date . . . on Opel's arrangements with Reisner" and for an evaluation of Reisner's 350 engine request. J.A. 53.

(e) Boniface answered that while "we do not have any objection to GM Italia, or Opel selling Chevrolet [350] engines for use in cars destined for the US market . . . we doubt that he can qualify for Chevrolet's minimum order quantity of some 200 engines." J.A. 57-58. Accordingly, on July 7, 1972, Drury directed Boniface to inform Reisner that Reisner's request did not satisfy the minimum order requirement.[8] Opel did so by letter to Reisner dated July 28, 1972. App. 6a, *infra.* However, Opel's "letter" went on to assure Reisner "that Opel would con-

[8]The Second Circuit's opinion, App. 6a, *infra,* line 9, mistakenly refers to the date of this Drury communication as "July 2, 1971" The correct date is July 7, 1972. J.A. 60-61.

tinue to supply him, through Bitter GmbH & Co., with the Opel engines [Chevrolet 327 engines] and components that it had supplied in the past." App. 6a, *infra*.

(f) As it became clear in late 1972 and early 1973 that GM would not sell Reisner the "clean" Chevrolet 350 engine he desired, Reisner "prepared to use a 'clean' Ford 351 CID engine instead [which was] as powerful as the Corvette 350 CID engine [and] equipped with emission control devices and could be used in Indras built for for export to the United States." App. 7a, *infra*. Reisner accordingly wrote Boniface (Opel's general sales manager), asking to buy only the Opel components. J.A. 63-64. On February 13, 1973, Boniface replied by stating: "Opel is willing to continue to supply mechanical components for the INDRA car through Bitter GmbH. The sets will consist of the same prices and material as in the past." App. 7a, *infra*. J.A. 65. This letter was followed on February 23 with a letter to Bitter (copy to Reisner) from A.A. Cunningham, Opel's managing director, objecting vigorously to Reisner's plan to put a "clean" Ford engine in the Indra. App. 7a, *infra*. Cunningham warned that Opel would "discontinue the supply of Diplomat components for the INDRA immediately should these plans be realized." *Id.* Reisner, of course. could not produce the Indra without the Opel components, as designed. Thus Opel, in February 1973, effectively "thwarted" Reisner's plan to export a Ford-powered Indra to the United States. *Id.*

(g) Undaunted, petitioners continued their efforts to purchase the "clean" GM Corvette 350 engine, "without which they could not export the Indra to the United States." App. 6a, *infra*. These 1973 efforts were carried on by Joseph Vos, president of petitioner Indra Imports, Inc., in a series of phone calls with high executives of GM. But GM steadfastly refused to alter Chevrolet's minimum 200-engine purchase requirement, and would not approve the use of engines other than the "dirty" Chevrolet 327 engine in the Indra. *Id.*

(h) Respondents have claimed that GM would have sold Reisner the "clean" Corvette 350 engine if Reisner had met the minimum purchase order requirement, and that Reisner had

said he "could have afforded to purchase '200 350 Chevrolet engines and pay for them all at once in March, 1973' . . . yet, Reisner chose not to do so." J.A. 853. Reisner confirmed this claim, but he testified in explanation that he "chose not to do so" because he had received a registered letter from Boniface, Opel's sales manager, dated March 16, 1973 (Exhibit 149), which "says that they first of all would not supply me" except through Bitter; "and also only the 327 cubic inch Chevrolet engine could be used. So even if we had bought 200 engines of 350 Chevrolet, we couldn't use them in conjunction with the [Opel components]." J.A. 1278-1279. In the same registered letter, Boniface assured Reisner that Opel would continue supplying Opel components and the "dirty" 327 engines. App. 7a, *infra*.

(i) On June 19, 1973, petitioners' attorney wrote GM, requesting that GM sell Reisner the "clean" 350 engine "in quantities of 25 to 50 per order." App. 7a, *infra*. This letter was attached as Exhibit A to petitioners' complaint. J.A. 130-135. On August 17, 1973, GM by letter refused this request. App. 7a, *infra*. GM's letter was attached as Exhibit B to the complaint. J.A. 136-139.

(j) GM's August 17 letter stated in part: "It is important to note, however, that Opel has at all times been ready and able to supply Bitter Co. with Opel components and Chevrolet 327 engines in accordance with the terms of its understanding . . ." J.A. 138. Later, William B. Slowey, one of GM's attorneys, stated in support of the motion for summary judgment that Opel had indeed "declined . . . to sell the [Opel] components alone, regardless of whether Reisner planned to use a 350 engine or another manufacturer's ["clean"] engine." J.A. 857. But Slowey added that Opel "remained willing . . . to continue to sell Reisner the ["dirty"] 327 engines and drive train components used in the Opel Diplomat *for Indras to be sold in Europe.*" J.A. 857; emphasis added.

(k) Reisner was never able to obtain any further parts and engines from Opel that would allow him to export the Indra to the United States. No alternative sources were available to supply the Opel parts around which the Indra was designed. Ad-

ditionally, in his limited European market, Reisner was unable to survive the sabotage of his production and marketing of the Indra brought by Opel's secret interest in and promotion of the competing Bitter sports car, marketed through Opel dealers. Reisner was thus forced to close a business he had successfully operated since 1965. Some 20 Indra car hulks, sans parts or engines, rotted away. And Reisner was forced to sell his personal and business effect in order to emigrate to the United States. He, and his exclusive U.S. importer, petitioner Indra Imports, Inc. had been totally excluded and eliminated from the competition in the American sports-car market.

(16) Special note must be made of two "findings" by the Second Circuit: (a) "since 1965, the policy of GM's Chevrolet Division was not to sell engines on an original equipment basis in lots of less than 200" (App. 5a, *Infra.*); (b) "neither GM's refusal to supply Reisner with the 350 CID Corvette engine nor Opel's refusal to supply Opel parts for use with Ford engines support an inference of conspiracy" (App. 17a, *Infra.*). Both those "findings" played critical roles in the court's ruling that GM "was well within its rights . . . in refusing to sell [the 350 engine] to Reisner in lots of less than 200" and that Opel "was perfectly justified in refusing Reisner's request." App. 17a-18a, *Infra.* And both "findings" were vigorously contested on the factual record.[9]

As to the alleged GM policy respecting minimum orders of 200 engines, GM's own answers to interrogatories demonstrate that Chevrolet sold its 350 engine in lots substantially less than 200 in each of the years from 1969 to 1975, and sold them to a number of small independent manufacturers like Reisner. J.A. 919-920. Reisner testified that he knew that certain sports-car manufacturers in Italy were able to purchase the Chevrolet 350

[9]The Second Circuit noted GM's claim that the Indra was consistently poor in performance and its safety "questionable." App. 6a-7a, *infra.* That statement relied on a telex from Boniface to Drury, dated March 16, 1973. That telex is directly contradicted in every material respect by Boniface's letter to Drury, dated June 28, 1972, quoted in part in paragraph (15)(e) above. See also paragraph (7) above, and J.A. 1251, 1262-1263, 1266-1268.

engine, presumably in small lots. J.A. 938. And Lutz, Opel's original sales manager, consistently pointed out that selling small lots of the 350 engine to Reisner presented no problem. See, e.g., J.A. 33, 937.[10]

As to Opel's refusal to supply Opel parts it will be recalled that in March 1973, when Reisner was willing to buy and pay for 200 of the Corvette 350 engines, he was suddenly told that Opel would not sell him Opel components unless they were to be used with the "dirty" 327 engines "for Indras to be sold in Europe." J.A. 857. Thus Reisner was put in a "Catch 22" position. He could buy Opel components only for use with a 327 engine. But without the 350 engine *and* use of Opel components, Reisner could not sell the Indra in the United States. Thus he and Indra Imports Inc. were effectively excluded from the American sports-car market.

Petitioners do not represent that all the foregoing material facts are uncontested, let alone proved. Respondents undoubtedly will contest many of the facts set forth above, as well as the interpretation thereof. But the point is that there are material issues and controversies about the relevant facts. For that reason alone, petitioners have consistently argued that Rule 56(c) dictates a denial of summary judgment in respondents' favor.

B. The rulings below

Any account of the relevant proceedings below must begin with the District Court's "endorsement" on the order denying respondents' motion to reargue their earlier motion to dismiss, a

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[10]The District Court made a "finding" in this regard that further confuses the search for the true GM policy respecting minimum sales of engines. It states, without reference to the conflicting evidence: "General Motors had a policy of requiring a minimum order of two hundred for Chevrolet engines, although smaller orders were still filled for a few manufacturers under arrangements that predated the institution of the policy." App. 23a, n. 4, *infra*. The court adds that this policy did not affect Reisner's purchase of Chevrolet 327 engines "apparently because he purchased the engines from Opel, not from General Motors." *Id.*

denial dated February 9, 1978. See App. 44a-46a, *infra*. The last paragraph of that "endorsement" states:

> It may be, in the final analysis, that the refusal to sell the Opel component parts in the United States is, as defendants argue, a mere refusal to deal, unconnected with an interest in selling the engines. It may be established ultimately that defendants simply do not want Opel type cars marketed in the United States by a competitor. Such a desire, however, may implicate the Sherman Act, rather than Clayton. *It is, therefore, a matter which must await a trial on the merits for determination.* [Emphasis added]

But when the District Court granted the respondents' motion for summary judgment in 1981, it ignored – indeed, it overruled – its own exemplary 1978 statement just quoted above. It granted summary judgment for the respondents, and dismissed a complaint which alleged precisely the same conspiracy in violation of Section 1 of the Sherman Act that the court in 1978 said "must await a trial on the merits for determination."

In its 1981 ruling, the District Court voiced the traditional standards for granting summary judgment pursuant to Rule 56(c). See App. 30a-31a, *infra*. It also identified various issues of fact, including whether Opel or Reisner initiated the idea of designing a new car with Opel components and engines, whether GM had a policy of not selling Chevrolet 350 engines in lots less than 200, whether Opel promised Reisner it would sell him the 350 engine, and when the first discussions of Reisner's using the 350 engine took place. App. 33a, *infra*.

But the court then proceeded to draw upon those issues to determine if the petitioners, against whom summary judgment was sought, had proved the essential elements of tying arrangements, under either Section 1 of the Sherman Act or Section 3 of the Clayton Act. See App. 35a-43a, *infra*. The court made no attempt to address the summary judgment aspects of the conspiracy-in-restraint-of-trade components of the claimed violation of Section 1 of the Sherman Act. Indeed, the District

Court expressly eschewed making any such assessment, making two significant remarks:

1. "Although this Court makes no determination at this time as to whether the defendants could be shown to be independant conspirators, for several reasons, this seems to be a particularly inappropriate case in which to find such an intra-enterprise conspiracy [i.e., as between Opel and GM]." App. 28a-29a *infra.*

2. ". . . the allegation that there was a group boycott conspiracy between General Motors and Opel to prevent the importation and sale of the Indra in the United States seems rather bizarre, since the Indra was *created* only after Opel had agreed to supply Opel components and Chevrolet 327 engines to Reisner. If Opel and General Motors were concerned with preventing the Indra from being sold in the United States, why did Opel make its creation possible?" App. 30a, *Infra.* emphasis in original.

The District Court devoted itself largely to determining that the petitioners had shown no merit to their tying claims and to establishing reasons why petitioners should be denied leave to file a second amended complaint. And since the court granted summary judgment and ordered the first amended complaint dismissed, various motions by respondents further to restrict discovery by petitioners were held to be moot. The court also avoided passing on any of the various motions of the petitioners claiming that respndents had suppressed evidence, dominated the discovery process and submitted allegedly false depositions, interrogatory answers and affidavits in support of the summary judgment motion. None of those matters need be examined here, for they are not included among the Questions Presented to this Court.

On appeal, the Second Circuit affirmed the actions of the District Court in all respects. Essentially, the court said it was making three holdings: (1) the petitioners had waived their claims under Section 2 of the Sherman Act and it would not be in the interest of justice to reinstate those claims on appeal; (2)

Reisner's failure to raise in the District Court the claim of suppression of evidence of the alleged "Bitter conspiracy" bars him from raising the claim on appeal, in addition to the claim being "utterly without support in the record"; and (3) "Finally, we hold that GM and Opel did not violate Section 1 of the Sherman Act by refusing to sell 'clean" Corvette 350 CID engines to Reisner or Opel components for use with Ford 351 CID engines." App. 12a-13a, *infra.*

Only the third holding of the Second Circuit is now before this Court. That holding is developed in the last two paragraphs of the opinion below. App. 16a-18a, *infra.* It appears to constitute a ruling of law based on what the Second Circuit deemed to be the facts, ignoring the highly contested nature of most of the material facts. The court made only one reference to the guiding principles on motions for summary judgment, to wit:

> "On this motion for summary judgment, we have drawn the facts of the case from the discovery record and the affidavits submitted by the parties. Where the evidence is susceptible of different inferences, we have taken the reasonable inference most favorable to the plaintiffs [petitioners herein], against whom summary judgment was granted. However, we have disregarded those factual claims made by Reisner after GM moved for summary judgment, where those claims contradict statements made previously by Reisner at his deposition, in his affidavits, and in response to defendants' interrogatories. [Two Second Circuit citations omitted]." App. 3a, *infra.*[11]

Applying that formulation, the Second Circuit proceeded to "draw" the facts from the discovery record and "take" the "reasonable inferences" most favorable to the petitioners, the nonmoving parties. That process led the court to conclude that petitioners' conspiracy claim under Section 1 of the Sherman Act "is likewise without merit," App. 16a-17a, *infra,* and that

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[11]To the extent that this embodies a finding that Reisner's deposition testimony was correctly reported and transcribed, it is conclusively contradicted by the record. J.A. 1094-1111.

"[w]hat the record discloses here is a commercial venture that went sour," App. 17a, *infra*. And on the court's assumption that Opel may have breached two promises to Reisner, the court further concluded that petitioners' "effort to convert what is essentially a claim sounding in contract into an antitrust conspiracy claim is unavailing because the basic premise of this alleged plot is simply incredible." App. 17a, *infra*.

Finally, in further reliance on its own findings of fact, the Second Circuit held that both GM and Opel were within their legal rights in refusing to supply Reisner with the 350 engine and with Opel parts for use with Ford engines. Such refusals were said to be insufficient to "support an inference of conspiracy." App. 17a, *infra*. Citation was made in this connection to *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

REASONS FOR GRANTING THE WRIT

1. The decision below, in applying a reformulation of summary judgment standards, conflicts with the language of Rule 56(c) and with this Court's controlling precedents.

The Second Circuit has subtly but substantially changed the standards that control the grant of a Rule 56(c) summary judgment. It has made summary judgment much easier to obtain in the context of complex antitrust litigation, where this Court has consistently warned that "summary procedures should be used sparingly." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). Rule 56(c) in that context has truly undergone a sea change. As a result, the decision below directly conflicts with the language and intent of Rule 56(c) and with the controlling precedents of this Court.

Rule 56(c) provides that summary judgment may be entered only when it appears that (a) "there is no genuine issue as to any material fact," and (b) "the moving party is entitled to a judgment as a matter of law." But under the Second Circuit's reformulation, summary judgment on the merits of a claim may be granted whenever the court itself has (a) "drawn the facts of the case from the discovery record and the affidavits," and (b) "taken the reasonable inference most favorable" to the nonmov-

ing party in situations where the court finds the evidence "susceptible of different inferences." App. 3a, *infra*. The Second Circuit's reformulation simply cannot be squared with the language or purpose of Rule 56(c). Rule 56(c) does not give a court any power or discretion to draw the relevant facts of the case from the discovery record or to take those inferences that seem most reasonable from among conflicting inferences. "The duty of the court under Rule 56 is to determine whether a genuine issue remains for trial; once it determines that a triable issue exists the inquiry is at an end and summary judgment must be denied." C. Wright and A. Miller, *Federal Practice and Procedure*, Vol. 10, § 2728, p. 553 (1973).

No decision of this Court has ever sanctioned or suggested such a reformulation. On the contrary, the Court has established Rule 56(c) principles that directly contradict the Second Circuit's new standards.

1. The Second Circuit's rule that the court itself may draw the necessary facts and inferences from the discovery record, while ignoring factual issues in dispute, is contradicted by this Court's repeated rulings that summary judgment is proper only "where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944); *Poller v. Columbia Broadcasting System, supra*, 467. Particularly where, as here, many of the court's findings are based on uncrossexamined opinions of respondents' officers and employees, *Sartor* commands that summary judgment be denied. 321 U.S. at 626.

2. The Second Circuit relegated to itself the twin functions of drawing the necessary facts from the record and making a choice of inferences from among conflicting inferences. But this Court in *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam), expressly disavowed such functions. It held that a court may not engage in "the resolution of a head-on factual controversy as revealed by the materials before the District Court." And *Diebold* condemned making "a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below."

If there are inferences to be drawn contrary to those selected by the court, summary judgment must be denied. It is for the trial factfinder — not the pretrial court — to determine which of different inferences is "reasonable" and how much weight or credibility to be attached to various possible inferences.

3. Relegating the factfinding and inference-drawing functions to the pretrial court, as the Second Circuit has done, is particularly ill-advised in complex antitrust litigation involving an alleged conspiracy in restraint of trade. This Court in *Poller*, 368 U.S. at 473, urged sparing use of summary judgment in such litigation precisely because "motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Thus, by allowing the pretrial court to draw facts and inferences from the discovery record as to the motive and intent of alleged antitrust conspirators, the Second Circuit's reformulation collides with the *Poller* decision, which also involved an alleged antitrust conspiracy.

4. Applying its new standards and reaching the conclusion that petitioners' conspiracy claims are "incredible" and without merit, the Second Circuit has effectively shifted to petitioners, the nonmoving parties, the burden of proving at pretrial the existence of a conspiracy. Such a shift is impermissible. Specifically, it conflicts with *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704 (1969) (per curiam). This Court there held that the burden is on the moving parties to "conclusively disprove by pretrial discovery" an alleged antitrust conspiracy. And see *Adickes v. Kress & Co.*, 398 U.S. 144, 159 (1970), as to "the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact."

5. The impropriety of the Second Circuit's reformulation is exacerbated by the fact that it was created by an appellate court for use by an appellate court. It is ironic that the District Court

that entered the summary judgment on review had recognized the proper rule 56(c) standards, App. 30a-31a, *infra*, but for irrelevant reasons did not see fit to apply those standards to the conspiracy charges; it declined to do so even though it had earlier recognized that the conspiracy charges should go to trial. App. 45a, *Infra*. Several pertinent questions remain. Did the Second Circuit create its reformulation solely for its own use, or solely for use in this case? Does the Second Circuit intend that all district courts in its circuit follow the reformulation? Is it a proper function for an appellate court, faced with an abdication of function by a lower court, to formulate and apply in the first instance standards for adjudicating summary judgment motions? Should not the Second Circuit have remanded the conspiracy charges to the District Court to assess the propriety of summary judgment?

Suffice it to say that had the proper Rule 56(c) standards been applied, no summary judgment could have been entered on the conspiracy charges. The discovery record is replete with disputed facts and inferences relative to the conspiracy. Most certainly, the moving parties did not disprove the possibilty that the respondents both intended and effectuated collaborative action to eliminate Reisner from the American sports-car market. Viewing the facts and inference most favorable to the petitioners, it is quite reasonable to say that there may well have been a classic conspiracy in restraint of trade – documented intent, a joint refusal by GM and Opel to deliver the promised 350 engines so necessary to Reisner's survival in the American market, a joint refusal to provide any Opel parts if Reisner used them with a "clean" Ford engine, and finally a joint choking off of Reisner's supply of parts altogether, forcing him out of business. See *United States v. General Motors Corp.*, 384 U.S. 127, 140 (1966), for a description of the same kind of conspiratorial pattern. Thus Reisner and his American importer of the Indra were effectively eliminated as competitors in the American sports car market.

2. The decision below raises important questions as to the extent to which economic self-interest is relevant for purposes of determining if there has been a conspiracy under Section 1 of the Sherman Act.

The Second Circuit began and ended its search for evidence of a Section 1 conspiracy between GM and Opel with the notion that, whatever they may have done to Reisner's competitive business, they were motivated solely by their "own commercial interests" and were "perfectly justified" in refusing to sell engines and components to Reisner that were so essential to his access to the American market. Each corporation's actions were "well within its rights," and the intra-corporate actions were between parent and subsidiary and "violated no law." As for Reisner, his was simply "a commercial venture that went sour." App. 17a-18a, *infra*. And while the court conceded the evidence might show that Opel breached two promises to Reisner, it held that any attempt to convert such a contract claim into a conspiratorial plot "is simply incredible." App. 17a, *infra*.

Such a search for evidence contradicting the existence of an alleged Sherman Act conspiracy, to borrow a phrase, "is simply incredible." This Court has never held that the overt self-interest of alleged conspirators is a proper or prime standard for justifying or immunizing a Sherman Act conspiracy. The Second Circuit's citation of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), App. 17a, *infra*, indicates a conscious attempt to express a standard in terms of the old and largely discredited *Colgate* doctrine, particularly that portion declaring that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307.

In a series of decisions, this Court has had to explain, limit and distinguish the *Colgate* doctrine, virtually to the point of overruling it.[12] See, e.g., *United States v. Parke, Davis & Co.*,

[12] For a summary of the tortured and twisting history of the *Colgate* doctrine, see Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L.

362 U.S. 29, 36-47 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 722 (1944); *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964); and see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 67-68 (1977) (White, J., concurring). Indeed, even the *Colgate* decision itself did not purport to give *carte blanche* to business concerns to select customers and to refuse to sell to whomever they please. The above-quoted statement of the *Colgate* doctrine is preceded by a significant qualifying proviso. As emphasized and italicized by the Court subsequently in *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951), the sentence in *Colgate* that expresses the doctrine is preceded by this clause: *"In the absence of any purpose to create* or maintain a monopoly, . . ."[13] As the Court went on to note in *Lorain Journal*, the right claimed to sell to whomever one pleases "is neither absolute nor exempt from [Sherman Act] regulation." *Id.* Literally, *Colgate* can be read to mean no more than that.

But as the Second Circuit's opinion in this case demonstrates, lower courts have not always respected the limited and qualified scope of the *Colgate* doctrine. The notion that a manufacturer is free to exercise an independent discretion as to parties with whom it will deal and that this is justified in the name of self-interest, without regard to the consequences, is one that seemingly will not die. If it is allowed to continue festering in the lower courts, resurrected from time to time to legitimize an antitrust conspiracy or monopoly, Section 1 of the Sherman Act could be drained of much effectiveness. The time to stop this erratic trend is now This case is an appropriate vehicle to reexamine *Colgate*, with an eve to providing its final demise.

Rev. 655, 680-705 (1962); L. Sullivan, *Handbook of the Law of Antitrust* 392-395 (1977).

[13] The full sentence in *Colgate* reads: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307.

The Second Circuit's use of the *Colgate* doctrine as a standard for determining the existence of a Sherman Act conspiracy is particularly questionable. In *United States v. General Motors Corp.*, 384 U.S. 127, 141-142 (1966), this Court condemned a trial court for having premised its conclusion that no conspiracy existed under Section 1 of the Act on the notion that "each defendant and alleged co-conspirator acted to promote its own self-interest" and had "a lawful interest in securing compliance with" the business arrangement in question. The Court stated, 384 U.S. at 142-143:

> "It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest . . . . it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy – certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan."

And the Court added that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct . . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed." 384 U.S. at 146-147.

The Second Circuit's use of the *Colgate* doctrine as a standard for inquiring into the existence of a conspiracy in this case cannot be squared with *General Motors*. And since this conflict involves an important and recurring problem in the administration of Section 1 of the Sherman Act, review by this Court is most appropriate.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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